



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1996

Ms. Raenell Silcox, Attorney
Resource Protection Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR96-2177

Dear Ms. Silcox:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 101889.

The Texas Parks and Wildlife Department (the "department") received a request for a variety of information relating to "any and all documentation (including maps, computerized data, audiotapes, video tapes, and/or photographic material of any kind) in the possession of, custody or control of the [department] pertaining to any and all pipeline activities conducted by [certain referenced companies]." You submitted to this office for review a representative sample of the available information you contend is at issue. You ask whether the department may withhold the requested information from required public disclosure based on sections 552.101, 552.103, 552.107, 552.108 and 552.111 of the Government Code. Specifically, you raise section 552.103 as an exception applicable to all of the documents submitted to our office. We have considered the exceptions you raise and have reviewed the documents at issue.

Although you raised sections 552.101 and 552.108, in your initial letter and brief to this office, you have not explained how these exceptions apply to any of the submitted records. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). However, as section 552.101 is a mandatory exception, we have reviewed the documents to ascertain whether any of the submitted information is confidential either by statute, by judicial decision, or under constitutional or common-law privacy. We conclude that there is no confidential information or information protected by constitutional or common-law privacy in the submitted documents.

Therefore, section 552.101 does not except the requested information from required public disclosure.

You contend that the requested information relates to "the petroleum spills which occurred in the area of the San Jacinto River on or about October 20, 1994 which is partially the subject of these requests." You state that the department "is a natural resource trustee designated by the Governor [of Texas] pursuant to authority under the Oil Pollution Act, 33 U.S.C. §2701 et seq." The Governor of Texas designated the department as one of the trustees for the state's natural resources pursuant to the Oil Spill Prevention and Response Act, chapter 40 of the Natural Resources Code.¹

We begin by observing that pursuant to section 40.107(c)(4), (5) of the Natural Resources Code, the department has adopted rules that affect the public's right to review certain information pertaining to the cleanup of pollution from oil spills. Generally, these rules require the state trustees to provide the public with an opportunity to review certain information and comment at certain stages in the process of assessing natural resource damage resulting from an oil spill. See 31 T.A.C. §§ 20.22(1) (requiring trustees to provide opportunity for public review and comment on assessment plans, restoration plans, and settlement agreements), .36(e)(1) (requiring trustees to submit a restoration project for public review and comment), .42(b) (requiring public review and comment of final settlement agreement between trustees and responsible person), .44(b) (prohibiting trustees from executing any document which relieves responsible person from liability for natural resource damages until public has had opportunity to review and comment on document), .44(c) (requiring trustees to provide opportunity for public review and comment when trustees select assessment procedures and protocols for negotiated, expedited or comprehensive assessment, when restoration plan is proposed, and prior to certification of completion of restoration plan), .44(d) (requiring trustees to invite members of public to participate in development and design of equivalent resource plan, and allowing member of public to request a hearing on said plan), and .44(e) (permitting trustees to invite public to participate in determining whether assessment is necessary).

We believe that these rules control access to particular information pertaining to the oil spills. The rules require, and in some cases permit, public review of certain information, including an equivalent resource plan, an assessment plan, a restoration plan, settlement agreements, restoration projects, and any document that relieves the responsible party from liability. See 31 T.A.C. § 20.44(a) (required public notice, review and comment). The department may not invoke a discretionary exception in the Open Records Act as authority to withhold such information from required public disclosure.

As for the information for which the department's rules do not provide a right of public access, we will consider the exceptions you raise. Section 552.103(a), the "litigation exception," excepts from required public disclosure information:

¹The state trustees for natural resources also include the Texas Natural Resource Conservation Commission and the Texas General Land Office.

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), the department must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding, to which the department is or may be a party. Open Records Decision No. 588 (1991). Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

As a trustee, the department may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of oil. See Nat. Res. Code § 40.107; 31 T.A.C. § 20.41. You inform us that in its capacity as a natural resource trustee, the department has a claim for natural resource damages from the petroleum spills that occurred in the area of the San Jacinto River on or about October 20, 1994. You further state that "[the department] considers itself to be in reasonable anticipation of litigation from the time of discovery of an unauthorized release of discharge until such time as satisfactory settlement has been reached with the responsible party, a court has made final disposition of the trustee's claim, or the trustees have officially abandoned their claim in writing." In this instance, we believe that the requested information relates to settlement negotiations or reasonably anticipated litigation to which the department is or may be a party. The department has supplied this office with information indicating that litigation is reasonably anticipated and that, if appropriate, the department will take enforcement action as authorized by statute. See Open Records Decision No. 588 (1991) (litigation includes a "contested case" that is before an administrative agency). Thus, we conclude that litigation is reasonably anticipated. We further find that the documents that have been submitted are related to reasonably anticipated litigation for the purposes of section 552.103(a).² We therefore conclude that the department may withhold the requested information based on section 552.103 of the Government Code, with the exceptions noted below.

In your brief to this office, you refer to Open Records Ruling 96-1002 and state that the department believes that the "documents which have been shared with the responsible party for purposes of furthering settlement negotiations," should also be withheld pursuant to section

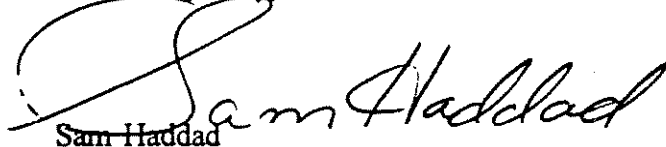
²You also asserted that some of the categories of requested information are excepted from required public disclosure based on sections 552.107 and 552.111 of the Government Code. Having concluded that the city may withhold the information from public disclosure pursuant to section 552.103, we need not address these additional claims at this time.

552.103. Generally, absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. However, in light of the statutory scheme involved, which can result only in settlement or litigation of natural resource damage claims by the trustee, we conclude that the department may withhold previously released "[i]nformation . . . relating to . . . settlement negotiations, to which the state is or may be a party" pursuant to section 552.103(a).

As mentioned above, the department may not withhold from disclosure information that is public by department rule. We also note that the applicability of section 552.103 ends once the litigation has been concluded.³ Attorney General Opinion MW-575 (1982) (concerning pesticide complaint investigation files); Open Records Decision No. 350 (1982) at 3.

We are resolving this matter with this informal letter ruling rather than with a published open records decision.⁴ This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad", written over a horizontal line.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/ch

Ref: ID# 101889

Enclosures: Submitted documents

³We note that, as with litigation, once the settlement negotiations are over, the information may not be withheld under section 552.103(a). We also note that any resulting final settlement agreement may not be withheld under section 552.103(a).

⁴In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

cc: Ms. Holly J. W. Huat
The Maieron Law Firm, P.C.
1914 North Memorial Way
Houston, Texas 77007
(w/o enclosures)